Supreme Court, U.S.
FILED
05-75 - JUL 7 - 2005
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

IN RE: URBAN BROADCASTING CORPORATION

THEODORE M. WHITE,

Petitioner,

v.

UNIVISION OF VIRGINIA, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly held that prior state court litigation precluded the Petitioner from having standing to appeal from orders entered by the bankruptcy court when the Petitioner was not a party to that litigation and the litigation was not addressed in the appeal before the district court.

2. Whether the Petitioner waived his right to appeal from orders entered by a bankruptcy court when he failed to file a formal objection to a proof of claim but did file a timely appeal from the order allowing the proof of claim.

LIST OF PARTIES

Petitioner is Theodore M. White, the appellant below. Respondents are Univision of Virginia, Inc., Stanley M. Salus, Chapter 7 Trustee, and the Office of the United States Trustee.

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Theodore M. White ("Mr. White") respectfully petitions for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Fourth Circuit

OPINIONS BELOW

The April 8, 2005 Order denying Mr. White's Petition for Rehearing is reproduced in Appendix C. The March 11, 2005 opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of Virginia is reproduced in Appendix A and is reported at 401 F.3d 236 (4th Cir. 2005). The decision of the United States District Court for the District of Virginia is reproduced in Appendix B and is reported at 304 B.R. 263 (E.D. Va. 2004).

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States Court of Appeals for the Fourth Circuit affirming a decision of the United States District Court for the Eastern District of Virginia. The judgment of the United States Court of Appeals was entered on March 11, 2005. The order denying the Petitioner's petition for rehearing was entered on April 8, 2005. The Court has jurisdiction over this petition pursuant to 28 U.S.C.A. § 1254.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 158 reads, in relevant part:

> (a) The district courts of the United States shall have jurisdiction to hear appeals [FN1]
>
> > (1) from final judgments, orders, and decrees;
> >
> > (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
> >
> > (3) with leave of the court, from other interlocutory orders and decrees;
>
> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

STATEMENT OF THE CASE

A. The Parties

Petitioner, Mr. White, is the majority shareholder of Urban Broadcasting Corporation ("UBC"). Joint Appendix ("JA.") 2155. UBC, which Mr. White formed in 1989, was the owner and operator of a UHF television station in the Washington D.C. area, Channel 14 WMTW ("Channel 14" or the "Station"). J.A. 2155. Shortly after UBC was incorporated, Mr. White and Silver King Broadcasting of Virginia, Inc. ("Silver King") entered into an August 21, 1989 Shareholder Agreement (the "Shareholder Agreement"), which resulted in Mr. White owning 55% of UBC and Silver King owning the remaining 45%. J.A. 2155-56. Respondent, Univision of Virginia, Inc. claims to be the successor to Silver King.

B. The Put and Call Agreement

UBC, Silver King and Mr. White also entered into an August 21, 1989 Right of First Refusal and Put and Call Agreement (the "Put and Call Agreement"). J.A. 132. The Put and Call Agreement contemplated that UBC would enter into an affiliation agreement with the Home Shopping Network (the "Home Shopping Network") to telecast Home Shopping Network programming on Channel 14. Consistent with the parties' expectation, UBC entered into a June 16, 1990 Television Affiliation Agreement (the "Affiliation Agreement") with Home Shopping Club, Inc. ("HSC"), which like Silver King was a subsidiary of the Home Shopping Network. J.A. 150-51. Under the terms of the Affiliation Agreement, HSC paid UBC for broadcasting HSC's "Home Shopping Spree" on Channel 14. J.A. 157.

Almost all of Channel 14's programming was devoted to broadcasting the Home Shopping Spree. J.A. 156-57.

Because of Channel 14's reliance on the Home Shopping Network, the Put and Call Agreement provided that Mr. White could purchase ("call") Silver King's forty-five percent (45%) interest in UBC for the nominal sum of ten dollars ($10.00) "if there is a default in the compensation payment by HSN under any affiliation agreement entered into with [UBC] that remains uncured for thirty (30) days after receipt of written notice by HSN." J.A. 423

The Put and Call Agreement contained a related "put option" under which Silver King could require UBC to redeem its 45% stock interest in UBC upon certain specified events, including UBC's breach of any affiliation agreement with Home Shopping Network. J.A. 137. The "call" and the "put" options were mutually exclusive. If Mr. White exercised the "call" and purchased Silver King's 45% interest in UBC, Silver King no longer could exercise the "put" because it no longer owned any UBC stock; conversely, if Silver King exercised the "put" and its stock was redeemed by UBC, Mr. White's "call" right would be extinguished because Silver King no longer held any stock which Mr. White could purchase.

C. UBC's First Bankruptcy Filing and the Dispute Concerning the Station's Operating Power

Litigation later arose between UBC and Silver King regarding the repayment of construction financing which Silver King had provided. J.A. 1963. In July of 1995, UBC was forced to file its first Chapter 11 bankruptcy case. J.A. 1964. In this first bankruptcy, the other Home Shopping

Network related company, HSC, fought to keep UBC from assuming the UBC/HSC Affiliation Agreement, which provided almost all of UBC's revenue and was the cornerstone of UBC's reorganization.

In contesting UBC's right to assume the Affiliation Agreement, HSC argued that the Affiliation Agreement required HSC to pay only "for those hours [UBC] airs HSC programming at full licensed operating power." J.A. 1987. HSC relied upon the "full licensed operating power" provision to argue that HSC was in default under the Affiliation Agreement and could not cure any default within a reasonable time period. J.A. 1987. HSC's claim was based on the construction permit for Channel 14 which allowed a maximum of 2880 kilowatts ("kW") of effective radiated power. J.A. 1987. After the construction was completed, the FCC allowed the Station to operate at only one-half of its broadcast power because of concerns about signal interference. J.A. 1974. Accordingly, the bankruptcy court concluded that 1440 kW (one half of 2880 kW) was the applicable "authorized power" for evaluating obligations under the Affiliation Agreement. J.A. 2013. Because the bankruptcy court believed that necessary repairs (relating to the station's transmitter tubes) could be made to allow Channel 14 to broadcast at 1440 kW, the court overruled HSC's objection to UBC's assumption of the Affiliation Agreement and confirmed UBC's fourth plan of reorganization on September 30, 1996. J.A. 1981-84.

However, a technical—but crucial—flaw existed in the bankruptcy court's confirmation analysis: Channel 14 could not operate at 2880 kW because of certain filters that had been installed by HSC's affiliate, Silver King, during construction to reduce signal interference. J.A. 1988-89.

These filters limited UBC's maximum effective power to 2541 kW and not the 2880 kW assumed by the bankruptcy court throughout the 1996 confirmation hearing. J.A. 1995-2008. Because of these filters, the fully licensed power for the station, subject to the FCC's requirement that the Station use only one-half power, was one-half of 2541 kW, and not one-half of 2880 kW. J.A. 1988.

At no time during the first bankruptcy case, the 1996 confirmation hearing or during HSC's objection to UBC's assumption of the Affiliation Agreement, did Silver King, which constructed the Station, or Home Shopping Network advise the bankruptcy court of the existence of the filters or the accompanying reduction of Channel 14's maximum power to 2541 kW (and which, because the half power restriction imposed by the FCC, would limit UBC's licensed power to 1270 kW and not the 1440 level that the bankruptcy court later acknowledged "was in error, factually"). J.A. 1775-1776.

Having laid in wait throughout the bankruptcy, HSC pounced mere days after UBC's reorganization plan was confirmed, and unilaterally stopped making any payments due under the Affiliation Agreement. J.A. 1986-91. Utilizing the bankruptcy court's erroneous dicta that the fully licensed power of the Station was 1440 kW, HSC declared that no payments were due because UBC was not broadcasting at 1440 kW. J.A. 1987-1990. Home Shopping Network took the incredible position that it was entitled to hour upon hour of free access to UBC's broadcasting signal if UBC was broadcasting at less than 1440 kW, and was entitled to this free access without any obligation to pay UBC even if the Station operated at fully licensed power of 1270 kW. J.A. 1987.

In response to Home Shopping Network's refusal to pay for the hours of broadcasting that UBC was providing, Mr. White, pursuant to his rights under the Put-Call Agreement, exercised his right to call/purchase Silver King's forty-five percent interest in UBC. J.A. 2010.

Having lost in the bankruptcy court on the issue of UBC's assumption of the Affiliation Agreement, HSC predictably moved to another forum, the Circuit Court for Arlington County, Virginia, and sought a declaratory judgment that, based on the bankruptcy court's previous (and factually erroneous) dicta that 1440 kW was the Station's fully licensed power, HSC had no obligation to pay for the broadcasting UBC was providing; UBC responded by suing to recover the payments that HSC refused to make. J.A. 1988-2012. Compounding the error that had started with the bankruptcy court, the state court judge found that the bankruptcy court's comments in its confirmation order regarding the 1440 kW power level was preclusive and binding, and, that as a result, HSC could continue to review free broadcasting of its programming as long as UBC was not broadcasting at 1440 kW. J.A. 1980-81.

Mr. White was not a party to the proceeding in the Circuit Court for Arlington County, Virginia. *See* J.A.. 2012-14.

D. UBC's Second Bankruptcy Filing and the Univision Proof of Claim

As a result of HSC's actions, UBC was forced to file a second Chapter 11 bankruptcy petition on August 1, 2000. J.A. 159. On August 6, 2001, substantially all of the assets of the UBC were sold. J.A. 2155.

Respondent Univision filed a proof of claim on or about October 17, 2001 after the UBC's bankruptcy petition had been pending for more than 14 months. In this proof of claim, Univision alleged to be the same Silver King entity that had entered into the 1989 Put and Call Agreement. J.A. 294. Univision's proof of claim was based on Silver King's "put option," i.e. the right to require UBC to redeem Silver King's forty-five percent interest in UBC. J.A. 294, 295. Univision also failed to provide any amount for its claim alleging that "Univision's claim is, at present, unliquidated" although Univision did contend that it was entitled to forty-five percent of any monies remaining after payment of UBC's creditors. J.A. 412.

On December 18, 2001, UBC, as the Chapter 11 debtor-in-possession, filed an objection to Univision's purported claim. J.A. 613-615. UBC's objection to the claim, inter alia, noted that "[t]he Claimant has incorrectly stated that it has rights under the [Put and Call] Agreement." Moreover, Univision's proof of claim did not account for Mr. White's October 1996 exercise of the "call" purchase. J.A. 613. Mr. White's exercise of the "call" precluded any claim by Silver King (or anyone claiming to be Silver King's successor) based on the "put option." *See* J.A. 306, 423. ("Silver King shall be deemed to have waived its right to exercise the Put Option in the event Class A Stockholder [Mr. White] elects to exercise the Call Option").

On October 29, 2001, UBC filed a fourth plan of reorganization. J.A. 330. Continuing in its efforts to thwart UBC and Mr. White, Univision filed a competing plan of reorganization. After two days of hearing, the Bankruptcy Court refused to confirm either plan of reorganization. J.A. 1078. Instead, the bankruptcy court appointed Stanley

M. Salus ("Mr. Salus" or the "Trustee") as the Chapter 11 Trustee for UBC on January 21, 2002. J.A. 1082-83.

Shortly thereafter, Univision's proof of claim entered a form of limbo. A January 22, 2002 UBC, the Trustee and Univision stipulated to continuing the hearing on UBC's objection to the proof of claim indefinitely; the hearing was removed from the bankruptcy court's calendar subject only to being reinstated at some later unspecified date. J.A. 1125-1128. Respondent Mr. White was not a party to the objection to claim or to the January 22, 2002 stipulation. J.A. 1128.

In August 2002, the bankruptcy case was converted from Chapter 11 to Chapter 7 proceeding, with the Chapter 11 Trustee, Mr. Salus, appointed to serve as the Chapter 7 Trustee. J.A. 1391-1393.

E. The Trustee's Proposed Distribution to Mr. White and Univision

As a result of sale of the Station, the UBC estate was solvent with approximately $17 million remaining after payment of administrative and creditor claims. J.A. 1419. On April 1, 2003, the Trustee filed a Motion for Interim Distribution of Estate seeking to distribute $15 million to UBC's two shareholders, Mr. White and Univision. J.A. 1414. The Trustee proposed to distribute 55% of the $15 million to Mr. White and 45% to Univision. J.A. 1420, 1421.

Not satisfied merely with being paid, Univision objected to the Trustee's interim distribution motion because Univision was being paid "as a shareholder" instead of a "creditor," J.A. 1541-1551. Univision's status did not affect the amount of money being distributed; whether as

shareholder or a creditor, Univision would receive 45% of the distribution. Univision noted, however, that Univision "has a claim against the Chapter 7 estate which has not been resolved and remains outstanding." J.A. 1841. Although Univision's claim was against the estate, Univision wanted a court order declaring it to be a creditor, and not a shareholder, because Univision hoped it might be able to utilize a bankruptcy court order against a third-party. J.A. 1445.

On June 3, 2003, the bankruptcy court held a hearing on the Chapter 7 Trustee's motion for interim distribution. J.A. 1598. Mr. White was not at that hearing, nor was he required to be. J.A. 1636.

The June 5, 2003 order entered by the bankruptcy court following the June 3, 2003 hearing placed additional burdens on Mr. White. J.A. 1636-1638. Although the Trustee was substituted for UBC with respect to the December 18, 2001 objection to Univision's proof of claim, the Court declared that "[a]ny objection by Mr. White to the allowance of Univision's claims must be filed by July 3, 2003 or forever be barred." The Court also left open the possibility that the Trustee could decide not to prosecute the claim objection — notwithstanding the merits of the objection — if the Trustee decided "[t]here would be no economic benefit to the bankruptcy estate in doing so." J.A. 1637. The bankruptcy court also ordered Univision to provide Mr. White with a copy of its amended proof of claim, due by June 13, 2003, and notice of the July 3, 2003 objection bar date — which only applied to Mr. White — as well as notice of a July 22, 2003 hearing on the objection to Univision's proof of claim and the motion for interim distribution. J.A. 1705-1724.

On June 30, 2003, before the July 3, 2003 deadline imposed on Mr. White by the bankruptcy court for filing an objection and having only recently been advised by the bankruptcy court on June 9, 2003 that he may have to pursue the entire objection to Univision's claim himself, Mr. White filed a Motion to Extend Deadline for Objecting to Claim, to Postpone Related Hearing Date, and to Authorize Trustee to Make Partial Distribution. J.A. 1658-1661. The motion, submitted on Mr. White's behalf by the law firm of Bean, Kinney & Korman, P.C. ("Bean, Kinney"), explained that Mr. White sought to retain Bean, Kinney to pursue the objection to Univision's claim, but that Kinney could not review the court file and file a substantive objection to Univision's claim by July 3, 2003.

Mr. White's June 30, 2003 motion also requested a release of some of $8.25 million (55% of 15 million) that the Trustee sought to distribute to Mr. White so that Mr. White could retain counsel to prosecute the objection. J.A. 1659, 1660, 1663. Mr. White's motion emphasized that millions of dollars were at stake, and that the interests of justice would be served by granting the requested relief. J.A. 1660, 1664. Mr. White also requested expedited consideration of the motion, noting as could be predicted, that Univision objected to the request for expedited consideration. J.A. 1660. The following day, July 1, 2003 the bankruptcy court denied Mr. White's motion for expedited consideration and refused to extend the July 3, 2003 objection deadline that the court had imposed on Mr. White. J.A. 1686-1688. The Court also refused to allow any immediate distribution of Mr. White's money to pay attorney fees stating only "[t]hat portion of the motion seeking authority for the trustee to make a partial distribution may be set for hearing on any regularly–scheduled motions day that provides at least 15 days notice

to the Chapter 7 Trustee and Univision." This decision had the practical effect of making it impossible for Mr. White to obtain counsel since Mr. White obviously could not schedule a hearing by July 3, 2003 or even by the July 22, 2003 hearing on the objection to Univision's claim. On July 3, 2003 two days later, Mr. White, now appearing pro se, sought reconsideration of the bankruptcy court's July 1, 2003 order. J.A. 1689-1690. Mr. White emphasized that "if he is denied the right to counsel to represent him before the Court . . . his rights and interests in this matter will be severely prejudiced." J.A. 1690. The Court did not address Mr. White's motion for reconsideration until the date of the hearing, July 22, 2003.

On July 18, 2003, just four (4) days before the hearing, the last chance for Univision's claim to be evaluated on its merits disappeared when the Chapter 7 Trustee provided formal notice that he would not prosecute the objection to Univision's claim. J.A. 1695. The Chapter 7 Trustee explained that, in part, "prosecution of the objection on any viable basis would necessarily entail potentially lengthy discovery regarding the underlying facts, as well as research, briefing and trial on the facts and related legal issues." J.A. 1700. The bankruptcy court went forward with the July 22, 2003 hearing to consider Univision's claim and the Trustee's motion for interim distribution. J.A. 1705-1724. At that hearing, the bankruptcy court acknowledged the request by the Bean, Kinney firm, on Mr. White's behalf, for an extension of the deadlines to prosecute the objection to the claim. J.A. 1707-08. With regard to the request for a distribution of funds to permit Mr. White to retain Bean, Kinney, the bankruptcy court stated that it would consider such a request on a non-expedited basis (although the bankruptcy court's concurrent refusal to extend the deadline for Mr. White to file and prosecute the objection rendered

any such request moot). J.A. 1708-09. The bankruptcy court, after expressing that it was unaware until that morning that Mr. White had even requested reconsideration of its July 1, 2003 rulings, denied Mr. White's July 3, 2003 motion for reconsideration. J.A. 1709-10.

Concerning Univision's claim, the bankruptcy court noted that "at this point you [Univision] have filed a claim. . . . which was objected to but the substituted party in interest [the Chapter 7 Trustee] is not prosecuting the objection to claim." J.A. 1710. In response to the bankruptcy court's inquiry as to why the claim should be allowed, counsel for Univision conceded that the documents it relied upon were not appended to its proof of claim but were, instead, annexed to its response to the Chapter 7 Trustee's request for an interim distribution. J.A. 1773. Even though it was aware that Mr. White objected to, and disputed, Univision's claim, and even though the Chapter 7 Trustee had announced his intention not to litigate the objection to the claim just two business days before the hearing, and even though there was no pressing administrative reason necessitating resolution of the claim that particular day, the bankruptcy court considered Univision's claim to be unopposed and entered an order allowing Univision's claim on the basis that Univision was presumed to have exercised the "put" option. J.A. 1908. At the same time, the bankruptcy court also authorized distribution to Univision in satisfaction of its claim. J.A. 1909.

Jurisdiction in the bankruptcy court was based on 28 U.S.C. §§ 157 and 1334.

F. Appellate History

On August 1, 2003, Mr. White timely filed a Notice of Appeal with the United States District Court for the Eastern District of Virginia. Mr. White filed his initial brief with the District Court, pro se, on September 12, 2003. Univision filed a motion to dismiss Mr. White's appeal on the grounds that Mr. White lacked standing under 28 U.S.C. § 158. J.A. 1746-1759. In an order dated January 28, 2004, the United States District Court for the Eastern District of Virginia granted Univision's motion to dismiss. App. B. The District Court held that Mr. White's failure to file an objection to Univision's claim in the bankruptcy court and his failure to appear at the July 22, 2003 bankruptcy court hearing on Univision's claim and the Trustee's proposed distribution precluded Mr. White from having standing to appeal under 18 U.S.C. § 158. The District Court also held that, by not filing an objection to Univision's claim by the July 3, 2003 deadline set by the bankruptcy court, constituted a waiver and barred Mr. White from attacking the bankruptcy court's order allowing Univision's claim and authorizing distribution to Univision.

On February 27, 2004, Mr. White timely noted an appeal to the United States Court of Appeals for the Fourth Circuit. Applying its opinion in *U.S. Trustee v. Clark (In re Clark)*, 927 F.2d 793, 795 (4th Cir. 1991), the Fourth Circuit held in a March 11, 2005 opinion that "[t]he test for standing to appeal a bankruptcy court's order to the district court is well-established: the appellant must be a person aggrieved by the bankruptcy order" and rejected the objection and attendance requirement used by the District Court. App. 13a. The Fourth Circuit, however, concluded that Mr. White was not directly or adversely affected by the bankruptcy court's orders and, therefore, could not appeal from those orders.

The Fourth Circuit's concluded that White was not a "person aggrieved" because, regardless of whether Univision was paid as a creditor or as a shareholder, White received only 55% of the proceeds with Univision receiving the other 45%. The Fourth Circuit erroneously concluded that Mr. White had conceded before the District Court that he was only entitled to 55%, and not 100%, of the proceeds, the Fourth Circuit relied on the following portion from the January 9, 2004 hearing before the District Court:

> DISTRICT COURT: Would your client object to the distribution to Univision of 45 percent of the assets as an owner of UBC?
>
> [COUNSEL FOR WHITE]: He did not.
>
> DISTRICT COURT: And wouldn't today?
>
> [COUNSEL FOR WHITE]: No. He would say that that distribution is subject to litigation, and a recoupment in another matter.
>
> THE COURT: Well, then he would object to it.
>
> [COUNSEL FOR WHITE]: No.

App. 14a. The limited portion of the transcript quoted by the Fourth Circuit ends before a crucial clarifying question from the District Court, a question which demonstrates that Mr. White continued to insist in the District Court, that he was entitled to 100% of the bankruptcy estate proceeds

> THE COURT: Your client objects to Univision getting 45 percent, either as a claimant or as an owner of UBC; is that right?
>
> [COUNSEL FOR WHITE]: That's correct.

J.A. at 2124-25 (emphasis added).

Later in the hearing before the District Court, the District Court several times confirmed its understanding that Mr. White claimed that he was entitled to 100% of the estate distribution and objected to Univision obtaining any money, whether as a creditor or shareholder. *See* App. 2128. (The District Court: "You said now that your client would object, whether or not Univision got paid as a creditor or as an owner."); App. 2132 (The Court: "It isn't – we are not fighting over whether Univision is going to get its money as a claimant or as a stockholder, but [whether] it will get its money. There is a chance it wouldn't get its money at all").

The Court of Appeals also held that Mr. White's failure to file an objection by the July 3, 2003 deadline set by the bankruptcy court constituted a "waiver" that precluded Mr. White from appealing the bankruptcy court's orders. Mr. White filed a Petition for Rehearing which was denied on April 8, 2005.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant The Petition Because The Court Of Appeals Improperly Held That Prior State Court Litigation Precluded The Petitioner From Having Standing To Appeal From Orders Entered By The Bankruptcy Court When The Petitioner Was Not A Party To That Litigation And The Litigation Was Not Addressed In The Appeal Before The District Court.

The District Court held that Mr. White did not have standing to appeal the bankruptcy court's July 22, 2003 orders allowing Univision's claim as a creditor and approving the Trustee's proposed distribution. App. B. Relying on cases from the Seventh, Ninth and Tenth Circuits,[1] the District Court anticipated that the Fourth Circuit would also conclude that Mr. White did not have standing because he had failed to file an objection to the Univision proof of claim and had not attended the bankruptcy court hearing. App. 39a. The District Court did not find that the prior Virginia state court litigation between UBC and Home Shopping affected White's standing to appeal. Indeed that litigation was not discussed by the District Court in its opinion.

The Fourth Circuit rejected the holdings of the Seventh, Ninth and Tenth Circuits in *Schultz*, *Commercial Western* and *Weston* and indicated that "[t]he test for standing to appeal a bankruptcy court's order to the district court is well-established: the appellant must be a person aggrieved by the

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1. *In re Weston*, 18 F.3d 860, 864 (10th Cir. 1994); *In re Schultz Manufacturing Fabricating Co.*, 956 F.2d 686, 690 (7th Cir. 1991); *In re Commercial Western Finance Corp.*, 761 F.2d 1329 (9th Cir. 1985).

bankruptcy order." App. 13a (*citing U.S. Trustee v. Clark (In re Clark*), 927 F.2d 793, 795 (4th Cir. 1991)). The Fourth Circuit added that "it is well-established that a person aggrieved is "a party 'directly and adversely affected pecuniarily.'" Clark at 795 (*quoting Fondiller v. Robertson (In re Fondiller*), 707 F.2d 441, 442 (9th Cir. 1983)).

The Fourth Circuit erroneously concluded that White has conceded in the argument before the District Court that Univision would be entitled to 45% of the amount to be distribution by the Trustee regardless of whether Univision was paid as a creditor or as a shareholder. Rather, White argued in the District Court that, because of his exercise of the "call" under the terms of the Put and Call Agreement, he owned 100% of UBC's stock and therefore was entitled to 100% of the proposed distribution.[2]

The Fourth Circuit also concluded that Mr. White's argument that he was entitled to 100% of the proceeds was "unsupported by anything in the record." App. 15a. The Fourth Circuit also

> Univision's claim under the put/call agreement requiring UBC to buy back its 45% interest in the stock of UBC was based on UBC's breach of its affiliation agreement with Home Shopping Network, and a Virginia state court has already

2. As demonstrated in Section F of the Statement of the Case, the Fourth Circuit relied on only a portion of the transcript of the hearing before the District Court. Immediately after the portion used by the Fourth Circuit, the District Court clarified that Mr. White was arguing that he was entitled to 100% of the distribution proceeds. That clarification is re-emphasized in numerous other parts of the District Court transcript. *See* Section F.

> determined that issue against UBC. Likewise, White's "call" to buy Univision's shares was dependent on Home Shopping Network's default under the affiliation agreement. And again, this issue was resolved against White in state court. On the record before us, there is nothing to support the assertion that White could cut Univision out of any share in UBC.

App. 15a.

The record in the District Court established that Mr. White has exercised his rights under the Put and Call Agreement. The record also demonstrated that Mr. White was not a party to the UBC/Univision litigation in Virginia.

"Whether an appellant is a 'person aggrieved' is generally considered a question of fact for the district court." *Dykes v. General Motors Acceptance Corp. (In re Dykes)*, 10 F.3d 184, 188 (3d Cir. 1993). "If there is a dispute in the relevant facts, the issue of an appellant's standing should be remanded to the district court." *Lopez v. Behles (In re American Ready Mix, Inc.)*, 14 F.3d 1497, 1500 (10th Cir.), *cert. denied*, 513 U.S. 818, 115 S. Ct. 77, 130 L. Ed. 2d 31 (1994). If no dispute exists, the standing issue may be decided by the circuit court. *Id.*

The record demonstrated that Mr. White did not concede in the District Court that Univision was entitled to 45% of the distribution from the estate. Similarly, the District Court did not make any finding of fact concerning the state litigation between UBC and Univision nor any finding of fact as to how that litigation might have impacted Mr. White's claim to 100% of the distribution. At a minimum, a dispute existed as to what occurred in that litigation and whether Mr. White's

"call" right was potentially affected by that litigation. Once the Fourth Circuit determined that the underlying basis of the District Court's decision, that Mr. White's failure to file an objection and attend the hearing in the bankruptcy court, was not relevant to standing, the open issue concerning the state court litigation required, at the minimum, a remand to the District Court.

II. The Court Should Grant The Petition Because The Court Of Appeals Improperly Held Petitioner Waived His Right To Appeal From Orders Entered By A Bankruptcy Court When He Failed To File A Formal Objection To A Proof Of Claim But Did File A Timely Appeal From The Order Allowing The Proof Of Claim.

The bankruptcy court's June 5, 2003 order provided that Mr. White was required to file an objection to Univision's proof of claim by July 3, 2003. Because Mr. White did not file a formal objection by that date, the Fourth Circuit held that "enforcement of the order according to its terms amounted to a waiver or forfeiture of Mr. White's right to challenge the order on appeal." App. 18a.

Waiver occurs "when a party voluntarily or intentionally relinquishes a known claim right." *First Union Commercial Corp. v. Nelsons, Mullins Riley & Scarborough (In re Varat Enterprises, Inc.)*, 81 F.3d 1310, 1317 (4th Cir. 1996); *AMF Bowling Worldwide, Inc. v. Herricks Fore Plan, Inc. (In re AMF Bowling Worldwide, Inc.)*. 278 B.R. 96 (Bankr. E.D. Va. 2002) *(citing Varat)*.

Both *Varat* and *AMF* involved the confirmation of bankruptcy plans of reorganization. In both cases, the appellants did not object to how claims were being treated

in the proposed plan of reorganization. After the plans were confirmed, the appellants then attempted to collaterally attack the claims.

Unlike the appellants in *Varat* and *AMF*, who sat idly by while the plans of reorganization were confirmed, Mr. White fought to comply with the Court's order requiring him to file any objection to Univision's proof of claim by July 3, 2003. Prior to the July 3, 2003 deadline, Mr. White filed a motion to extend that deadline so that he could have time to obtain counsel and fully investigate Univision's newly filed claim. J.A. 1856. Mr. White also simultaneously filed a Motion for Exhibited Hearing. J.A. 1861. When the bankruptcy court denied those motions, Mr. White still fought on, filing a motion for reconsideration on the July 3, 2003 deadline. Mr. White then timely appealed to the District Court. Under these circumstances, Mr. White cannot possibly be considered to have "voluntarily or intentionally relinquishe[d] a known claim right."

The Fourth Circuit analogized the July 3, 2003 deadline to summons requiring a defendant to respond by a certain date and "which notifies the defendant that his failure to do so will result in a judgment by default against him." App. 18a. This analogy demonstrates the error in the Panel's waiver analysis. If the failure to respond by the response date constitutes a waiver then the mere failure to file by the response date would forever bar the defendant from avoiding a default judgment, regardless of the underlying merits of the defendant's claim. Moreover, under this analysis, if the Court denies a motion to extend the time for the defendant to file a response, then a waiver will be deemed to have occurred even if the refusal to grant the extension were a clear abuse of the trial court's discretion.

Moreover, the effect of the Fourth Circuit's holding is that the failure to comply with any court set deadline would destroy any right to appeal. The right to appeal, in practical terms, would become a nullity.

A waiver cannot be applied to circumstances, such as occurred with Mr. White, where the court sets a deadline and a party attempts to seek additional time to comply with the deadline. Thus, Mr. White had the right to contest the bankruptcy court's erroneous and outrageous decision to deny him access to his own funds, to hire counsel to wage war on his behalf and to grant him a brief continuance to do so. Mr. White was entitled to the District Court's review of these erroneous bankruptcy court decisions.

CONCLUSION

For the reasons Petitioner, Theodore M. White, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 11, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04-1262

In Re: URBAN BROADCASTING CORPORATION,

Debtor.

THEODORE M. WHITE,

Appellant,

v.

UNIVISION OF VIRGINIA INCORPORATED,

Appellee,

STANLEY M. SALUS,

Trustee-Appellee,

and

U.S. TRUSTEE,

Party-in-interest.

Argued: February 2, 2005

Decided: March 11, 2005

Before NIEMEYER, MICHAEL, and DUNCAN, Circuit Judges.

Appendix A

OPINION

NIEMEYER, Circuit Judge:

In this Chapter 7 bankruptcy of Urban Broadcasting Corporation ("UBC"), Univision of Virginia, Inc. ("Univision"), a 45% owner of UBC's stock, filed a claim to require UBC to buy its 45% equity interest in accordance with a put/call agreement between it and UBC. Because the bankruptcy estate had approximately $17.5 million in it after all creditors, except Univision, had been paid, Univision's shares were worth about $7.86 million. Allowing Univision's claim as a creditor under the put/call agreement therefore would yield Univision the same amount that it would receive if its claim were disallowed and it were paid as a 45% equity owner of UBC.

The bankruptcy court conducted a hearing on Univision's claim on July 22, 2003. Theodore White, the owner of the remaining 55% of the shares of UBC, did not attend the hearing, nor did he submit any objection, despite the bankruptcy court's order that he file any objection by July 3, 2003, or "be forever barred." Following the hearing, the court allowed Univision's claim *as a creditor* under the put/call agreement and authorized distribution of $7.86 million to Univision and the remaining distributable amount of $8.85 million (net of administrative expenses) to White.

White appealed the bankruptcy court's July 22 allowance order, as well as two procedural orders relating to the July 22 allowance order, to the district court. With respect to the allowance order, White contended that Univision should have

received the $7.86 million not as a *creditor*, but rather as a *shareholder* of UBC. Even though there would be no difference in the amount of distribution, White argued that a distribution to Univision as a creditor would have a greater *res judicata* effect in any subsequent court proceeding and thus would affect him adversely. White expressly told the court that he was intending to file a separate suit against Univision after the bankruptcy proceedings were completed.

On Univision's motion, the district court dismissed White's appeal on the ground that he had no standing to challenge the bankruptcy court's order because he "failed to file an objection to the claim despite the bankruptcy court's order to do so by July 3 'or be forever barred'" and also because he "failed to appear and object at the July 22 bankruptcy court hearing regarding Univision's claim." The court ruled alternatively:

> Even assuming *arguendo* that White had standing to appeal, however, White's failure to object despite specific direction by the bankruptcy court to do so is a "voluntary and intentional" relinquishment of his objection and hence a waiver. As a consequence, White is barred from attacking Univision's claim and allowance order.

Although our reasoning differs somewhat from that advanced by the district court, we affirm the district court's judgment on the grounds that (1) White was not "a person aggrieved" by the bankruptcy court's order, as the term "person aggrieved" is used to justify standing to appeal a bankruptcy order, and (2) in any event, White waived or

forfeited the right to challenge the bankruptcy court's July 22 order by failing to comply with the bankruptcy court's June 5, 2003 order to file such a claim or "be forever barred" from doing so. In view of these conclusions, we also conclude that the bankruptcy court's procedural orders were interlocutory and therefore not appealable to the district court.

I

Theodore White and Silver King Broadcasting of Virginia, Inc. ("Silver King") formed UBC in 1989 to operate a Home Shopping Network-affiliated television station in the Washington, D.C. area. In exchange for financing the initial construction of the station, Silver King received a 45% equity stake in UBC, and White, who was to serve as UBC's CEO and general manager, received the remaining 55%. White and Silver King also entered into a "Right of First Refusal and Put and Call Agreement." Under the terms of that agreement, Silver King had a right to require UBC to purchase its shares on the occurrence of certain triggering events (a "put"), including UBC's default on any loan agreements, UBC's failure to affiliate with the Home Shopping Network, and UBC's failure to perform its obligations under such an affiliation agreement. White had a "call" option on Silver King's shares, which gave him the right to purchase Silver King's stock in the event that Home Shopping Network defaulted on its compensation payments to UBC under an affiliation agreement.

Shortly after signing the put/call agreement, Silver King changed its name to HSN Broadcasting of Virginia, Inc., and the put/call agreement was amended accordingly. Later, HSN

Broadcasting of Virginia, Inc., became, by another name change, USA Station Group of Virginia, Inc. Yet later, USA Station Group of Virginia, Inc., was among the entities purchased by Univision Communications, Inc., and became Univision of Virginia, Inc. ("Univision"), the claimant in this case.

Almost from the beginning, UBC was marred by fighting between its equity owners and by problems with its affiliation agreement with Home Shopping Network. Construction-related disputes between the owners of UBC led UBC to file its first Chapter 11 bankruptcy in 1995, and shortly after UBC emerged from bankruptcy in 1996, litigation ensued in Virginia state court between UBC and Home Shopping Network when Home Shopping Network discontinued its affiliation payments to UBC. Both UBC and Home Shopping Network asserted that the other was in breach of their affiliation agreement, but Home Shopping Network ultimately prevailed, obtaining a declaratory judgment that it had not breached the agreement.

Because UBC was no longer receiving affiliation payments from Home Shopping Network, it was forced to file a second Chapter 11 bankruptcy proceeding in August 2000—the bankruptcy that is at issue in this appeal. USA Station Group of Virginia (formerly Silver King) filed a motion to appoint a Chapter 11 trustee. To avoid the appointment of a trustee, however, UBC agreed to sell substantially all of its assets. The bankruptcy court conducted an auction in April 2001, and Univision Communications, Inc., was the highest bidder for the assets at $60 million. About that same time, Univision Communications, Inc., also

completed its acquisition of USA Networks, Inc.'s broadcast television subsidiaries, and USA Station Group of Virginia, Inc., thereby became Univision of Virginia, Inc. ("Univision"). Thus, Univision became the presumptive successor-in-interest to Silver King's 45% equity stake in UBC and the put/call agreement that White and UBC originally entered into with Silver King.

During the course of UBC's Chapter 11 proceeding, Univision, as 45% owner of UBC, filed a proof of claim based on the put/call agreement, contending that triggering events had occurred and that UBC was therefore required to buy its 45% interest in UBC. UBC objected to the claim, primarily disputing Univision's asserted status as a successor in interest to the put/call agreement.

Concerned with White's control of the bankruptcy estate, the bankruptcy court appointed Stanley M. Salus as Chapter 11 trustee on December 19, 2001. The court concluded that "given the debtor's failure to propose a confirmable plan, the best way at this point of getting creditors paid is ... to appoint a Chapter 11 trustee in this case." Salus thereafter proceeded to pay all claims against UBC—except Univision's claim based on the put/call agreement—using the $60 million in proceeds from the asset sale. On August 23, 2002, the case was converted into a Chapter 7 proceeding.

After the trustee paid the claims against UBC, approximately $17.5 million remained in the bankruptcy estate for distribution to UBC's equity holders— White and Univision. Accordingly, the trustee filed a motion for interim distribution of these funds in April 2003, proposing to

distribute 55% to White and 45% to Univision. Univision, however, objected, contending that it had an unresolved claim as a creditor under the terms of the put/call agreement. Even though Univision would receive the identical amount as a creditor under the put/call agreement in payment of its 45% equity interest as it would receive directly as a 45% equity holder, Univision was motivated by a desire to avoid any additional litigation with White. Univision apparently expected that payment to it as a creditor would have a stronger *res judicata* effect in anticipated post-bankruptcy litigation with White than would payment to it as a shareholder.

The bankruptcy court held a hearing on the trustee's motion for interim distribution on June 3, 2003, and concluded that Univision's proof of claim had to be resolved prior to any distribution to equity holders. The bankruptcy court accordingly entered an order dated June 5, 2003, in which it substituted the trustee for the debtor-in-possession with respect to UBC's objection to Univision's claim, but clarified that "[n]othing in this order, however, requires the trustee to prosecute the objection if there would be no economic benefit to the bankruptcy estate in doing so." The order also scheduled a hearing for July 22, 2003, and explicitly warned White that "any objection by [him] to the allowance of Univision's claim must be filed by *July 3, 2003*, or be forever barred." Even though White elected not to be present at the June 3 hearing, he was served with a copy of the June 5 order both by Univision and by the bankruptcy court clerk.

In response to the bankruptcy court's June 5 order, White filed a motion on June 30, 2003, to extend the deadline for

objecting to Univision's claim; to postpone the hearing date; and to authorize the trustee to make a partial distribution to him to retain counsel for prosecuting an objection to Univision's claim. White also requested expedited hearing of his motion. The next day, July 1, the bankruptcy court denied the motion for extension of time to file an objection and to postpone the hearing, denied White's motion for expedited hearing, and stated that White's motion seeking authority for the trustee to make a partial distribution could be scheduled on any regularly scheduled motions day providing adequate notice. The court explained its denial of White's procedural motions as follows:

> The simple fact of the matter is that this case has been before the court for an inordinately long period of time and that most of the delay in the administration of the case has been the fault of Mr. White. For him to wait until the last moment to attempt to bring new counsel on board and then to cite his own procrastination as the basis for a continuance is unacceptable.

White then filed a motion on July 3, 2003, for reconsideration of the bankruptcy court's order, which he characterized as an order "denying application to employ Bean, Kenney & Korman as counsel." This motion focused on White's claimed lack of funds to retain proper counsel to represent his interests before the bankruptcy court. (White's appellate counsel acknowledged during oral argument that Bean, Kenney & Korman had refused White further representation after not having been paid.)

Appendix A

On July 18, 2003, four days before the scheduled July 22 hearing, the trustee filed a memorandum informing the bankruptcy court and the parties that he did not intend to object to Univision's claim at the hearing. He explained that since "Univision would be compensated the identical amount whether as a creditor or as a shareholder" and since "prosecution of [UBC's] objection on any viable basis would necessarily entail potentially lengthy discovery regarding the underlying facts, as well as research, briefing and trial on the facts and related legal issues, with the estate incurring concomitant fees and expenses," there would be no purpose nor any economic benefit to be gained by prosecution of the objection.

On July 22, 2003, the hearing proceeded as scheduled, but White elected not to attend. The court began the hearing by denying White's motion for reconsideration, noting that White "did not need the approval of this court to employ counsel to represent his interest as a shareholder" and that the motion was never noticed for a hearing. Following the hearing, the bankruptcy court entered three orders, one formally denying White's motion for reconsideration; one allowing Univision's claim in the amount of $7,861,530; and one authorizing an interim distribution of $8,850,000 to UBC, which was now 100%-owned by White in view of Univision's put of its shares to UBC.

After White appealed the bankruptcy court's orders to the district court, Univision filed a motion to dismiss, which the district court granted. *See White v. Univision of Va. (In re Urban Broadcasting Corp.)*, 304 B.R. 263 (E.D. Va. 2004). Noting that White was appealing three orders—the July 1

order denying his motion to extend the objection deadline, postpone the hearing, and authorize partial distribution; the July 22 order denying his motion for reconsideration; and the July 22 order allowing Univision's claim—the district court held that the July 1 order and the first July 22 order were interlocutory. *Id.* at 269. Only if White had standing to appeal the July 22 order allowing Univision's claim, the final order into which the two interlocutory orders merged, could the interlocutory orders properly be considered on appeal. *Id.* at 270. The district court then concluded that White was not a "person aggrieved" and therefore had no standing to appeal the bankruptcy court's July 22 order allowing Univision's claim because (1) White failed to file an objection after being warned that failure to do so would result in any objections being "forever barred," and (2) White failed to appear and object to the claim at the July 22, 2003 hearing. *Id.* at 270-71. The court held alternatively that White's "failure to object despite specific direction by the bankruptcy court to do so is a 'voluntary and intentional' relinquishment of his objection and hence a waiver. As a consequence, White is barred from attacking Univision's claim and the Allowance Order." *Id.* at 273.

From the district court's order, dated January 28, 2004, White appealed, making two arguments. First, he contends that he does have standing to appeal from the order allowing Univision's claim and authorizing an interim distribution because he is a "person aggrieved," a status that does not require him to have appeared and objected at the July 22 hearing. Second, he contends that, in any event, he has standing to appeal the bankruptcy court's interlocutory orders—the July 1 order and the first July 22 order—because he has "timely appealed from [these] 'final' orders."

Appendix A

II

White's principal argument on appeal is that the district court erred in concluding that he was not a "person aggrieved" by the bankruptcy court's order allowing Univision's claim on the ground that he did not file an objection to or attend the hearing on the claim. He argues that his standing to appeal is not related to whether he objected to the claim or attended the hearing, but rather on whether the bankruptcy court's order "directly and adversely affected [his] pecuniary interests." And to fulfill this requirement for standing, he asserts in his brief on appeal:

> If Univision's claim were denied in its entirety, then White would have been entitled to 100% of the surplus proceeds in the Chapter 7 estate. Similarly, if the bankruptcy court determined that White had exercised "call" and acquired all of Silver King/Univision's stock in UBC, then Univision's "put" claim would have been rendered a nullity and White would have held 100% of UBC's stock; even if all the surplus proceeds were returned to UBC, White would have been the beneficial recipient of all of the $15 million being disbursed because he would then be the sole shareholder of the company.

Thus, while White and the district court both recognize that White's right to appeal depends on whether he was a "person aggrieved" by the bankruptcy court's order, they disagree on the relevance of whether White filed an objection to the claim or attended the hearing.

The district court concluded that White was not a "person aggrieved" on two distinct bases. *First*, it stated that given White's failure to object to Univision's claim and "the clarity of the bankruptcy court's June 5 order, White's objection has been 'forever barred,' and thus he is not a 'person aggrieved' . . . with regard to the July 22 Allowance Order and does not meet the standard governing standing to appeal." *White*, 304 B.R. at 270-71 (footnote omitted). "A contrary conclusion," the district court continued, "would render bankruptcy court orders meaningless and imperil the integrity of the bankruptcy process." *Id.* at 271. *Second*, the district court relied on cases from other circuits and concluded that the Fourth Circuit would likely conclude, "consistent with the Seventh, Ninth, and Tenth Circuits, . . . that attendance and objection at the bankruptcy court hearing are pre-requisites to appellate standing" under the "person aggrieved" test. *Id.* at 272. *See, e.g.*, *Weston v. Mann (In re Weston)*, 18 F.3d 860, 864 (10th Cir. 1994); *In re Schultz Mfg. Fabricating Co.*, 956 F.2d 686, 690 (7th Cir. 1992); *Brady v. Andrew (In re Comm. W. Fin. Corp.)*, 761 F.2d 1329, 1335 (9th Cir. 1985). *But see, e.g.*, *Int'l Trade Administration v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 748 (2d Cir. 1991) (holding that a "person aggrieved" has standing to appeal whether or not that person sought intervention); *Maynard Savs. Bank v. Michels (In re Michels)*, 286 B.R. 684, 690 (B.A.P. 8th Cir. 2002) (concluding that a creditor had standing to appeal a confirmation order even though it failed to file a timely proof of claim); *Johnson v. E.C. Ernst, Inc. (In re Ernst, Inc.)*, 2 B.R. 757, 761 (S.D.N.Y. 1980) (recognizing that the now-repealed Bankruptcy Act provision that originated the "person aggrieved" standard did not include any appearance requirement). The district court in this case reasoned in light

of these cases that, because White failed to appear at the July 22, 2003 bankruptcy court hearing and to object to Univision's claim, he lacked standing to appeal.

The test for standing to appeal a bankruptcy court's order to the district court is well-established: the appellant must be a *person aggrieved* by the bankruptcy order. *See U.S. Trustee v. Clark (In re Clark)*, 927 F.2d 793, 795 (4th Cir. 1991). Likewise, it is well-established that a person aggrieved is "a party 'directly and adversely affected pecuniarily.'" *Id.* (quoting *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 442 (9th Cir. 1983)).

We conclude that defining standing by whether a party waives or forfeits rights to object to claims, as did the district court, misconstrues the standing requirement as we have defined it, i.e., that the appellant show that he has been *directly and adversely affected pecuniarily* by the bankruptcy order. Moreover, defining standing by whether an appellant has objected to an order or attended a hearing conflates basic notions of standing with notions of waiver and forfeiture. Accordingly, we adhere to the formulation of standing articulated in *Clark* and, in this case, ask only whether White was directly and adversely affected pecuniarily by the bankruptcy court's order.

Up to this point in the analysis, therefore, we agree with White's position. The difficulty for White hereafter, however, is that he has failed to demonstrate that the bankruptcy court's order allowing Univision's claim directly and adversely affected his pecuniary interests.

Appendix A

Under the bankruptcy court's order, White would receive 55% of the $17.5 million in the bankruptcy estate, regardless of whether Univision is paid its 45% as a creditor under the put/call agreement or whether Univision is paid its 45% directly as a shareholder. The trustee chose not to oppose Univision's claim under the put/call agreement precisely because there was no economic difference between the two scenarios. Moreover, White himself took the same position before the district court, as manifested in this exchange between his counsel and the court:

THE COURT:	Would your client object to the distribution to Univision of 45 percent of the assets as an owner of UBC?
COUNSEL FOR WHITE:	He did not.
THE COURT:	And wouldn't today?
COUNSEL FOR WHITE:	No. He would say that that distribution is subject to litigation, and a recoupment in another matter.
THE COURT:	Well, then he would object to it.
COUNSEL FOR WHITE:	No.

White's claim—made for the first time on appeal—that he could own 100% of the shares of UBC if he were

successful is not only inconsistent with his concession before the district court, but also unsupported by anything in the record. Univision's claim under the put/call agreement requiring UBC to buy back its 45% interest in the stock of UBC was based on UBC's breach of its affiliation agreement with Home Shopping Network, and a Virginia state court has already determined that issue against UBC. Likewise, White's "call" to buy Univision's shares was dependent on Home Shopping Network's default under the affiliation agreement. And again, this issue was resolved against White in state court. On the record before us, there is nothing to support the assertion that White could cut Univision out of any share in UBC.

Without providing a satisfactory response to this economic reality, White advances a second argument to support his claim that he is a "person aggrieved." He claims that the potential *res judicata* effect of the bankruptcy court's July 22, 2003 allowance order is greater than if Univision's claim had not been allowed. According to White, he "faces the very real prospect that Univision will argue in the future that [the bankruptcy court's] orders bar [his] claims against Univision." White, however, never substantiates this argument. Indeed, the record would reveal that regardless of whether the bankruptcy court ordered distribution to Univision under the put/call agreement or to Univision directly as a shareholder, White would be left with a bankruptcy court adjudication. More precisely, he would be bound by the bankruptcy court's adjudication *either* that Univision was entitled to have its shares purchased by UBC (now the estate) under the put/call agreement for $7.86 million *or* that Univision was entitled to have the estate pay

it $7.86 million directly due to the fact that it owned 45% of the shares in UBC. In either case, the bankruptcy court's determination presumably would be binding in later adjudication under principles of *res judicata.*

Without demonstrating how the two determinations would have a different *res judicata* effect that would directly and adversely affect White's pecuniary interests, his *res judicata* argument must fail. Certainly, it is not the responsibility of the district court, nor this court, to predict the *res judicata* effect of its orders on a hypothetical future case. Moreover, even if a court attempted to do so, any such prediction could only be based on rank speculation.

Because White failed to demonstrate that he suffered a direct and adverse pecuniary harm as the result of the bankruptcy court's July 22, 2003 allowance order, he was not a "person aggrieved" and therefore did not have standing to appeal the order to the district court.

III

In addition to dismissing White's appeal on standing grounds, the district court held that White waived his right to appeal the bankruptcy court's July 22, 2003 allowance order by failing to file an objection to Univision's claim despite the bankruptcy court's clear and unambiguous order to do so by July 3, 2003, or "be forever barred." *White*, 304 B.R. at 270, 273. In its discussion of standing, the district court explained the importance of enforcing such an order:

> Because White failed to object, the bankruptcy court, when it allowed Univision's claim, was not

> aware of any objection by White to the claim or of any evidence White might offer in support of an objection. Given this and given the clarity of the bankruptcy court's June 5 order, White's objection has been "forever barred" . . . .

Id. at 270.

In his brief on appeal, White does not address this ground advanced by the district court, nor does he challenge the legality of the bankruptcy court's June 5, 2003 order. Accordingly, we are not provided with any reason why White's right to challenge the bankruptcy court's July 22, 2003 allowance order was not waived or forfeited by his failure to comply with the bankruptcy court's June 5 order.

The bankruptcy court's June 5 order was a comprehensive scheduling order entered to administer the disposition of Univision's claim. In the order, the court (1) directed Univision to file an amended proof of claim by June 13, 2003, setting forth the final liquidated amount of its claim; (2) substituted the trustee for UBC on UBC's objection to the claim; (3) directed that White file any objection to the allowance of Univision's claim by July 3, 2003, "or be forever barred"; (4) scheduled a hearing on Univision's claim for July 22, 2003; (5) directed Univision to give notice to the trustee and to White of "the claim objection bar date" and the hearing date; (6) continued the trustee's motion for an interim distribution; and (7) directed the clerk to mail the order to the parties, including White. We cannot conceive of any reason why this order was not an appropriate one for the bankruptcy court to have entered,

and White has not suggested any reason why it was not a legal order.

Provision (3) of the order, directing White to file any objection he might have to the allowance of Univision's claim by July 3 "or be forever barred," was clear and functioned much like any writ of summons that commences an action or proceeding. As was the case with the bankruptcy court's June 5 order, a summons issues from the court; is served on the defendant; states the date by which the defendant must appear and respond; and notifies the defendant that his failure to do so will result in a judgment by default against him. *See, e.g.*, Fed. R. Civ. P. 4(a); *see also* Fed. R. Bankr. P. 7004(a). In this case, rather than promising a default judgment, the bankruptcy court's order stated similarly that White's failure to file his objection would forever preclude his making an objection. Because we have been given no reason why this order should not be enforced and can discern no reason ourselves, we conclude that it was properly enforced according to its terms.

Whether such enforcement amounted to a nullification of any pecuniary interest for purposes of standing is not something that we need to decide, because enforcement of the order according to its terms amounted to a waiver or forfeiture of White's right to challenge the order on appeal. *See First Union Commercial Corp. v. Nelsons, Mullins, Riley & Scarborough (In re Varat Enterprises, Inc.)*, 81 F.3d 1310, 1317 (4th Cir. 1996); *AMF Bowling Worldwide, Inc. v. Herricks Fore Plan, Inc. (In re AMF Bowling Worldwide, Inc.)*, 278 B.R. 96, 101 (Bankr. E.D. Va. 2002); *see also Freytag v. Comm'r*, 501 U.S. 868, 894 (1991) (Scalia, J.,

concurring) (noting that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in a criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it" (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)) (internal quotation marks omitted)); *id.* at 894 n.2 (Scalia, J., concurring) (noting that "waiver" is probably a subset of "forfeiture" and concluding that "[s]ome rights may be forfeited by means short of waiver").

Accordingly, we agree with the district court's alternative ruling that because the bankruptcy court's June 5, 2003 order clearly and unambiguously directed White to file an objection to Univision's claim by July 3, 2003 or be forever barred and because the order was concededly served on White, his failure to comply with the order amounted to a waiver or forfeiture of his right to challenge the July 22, 2003 order on appeal.

IV

Finally, White contends that, independently of his standing to appeal the allowance order, he should be permitted to appeal the bankruptcy court's July 1, 2003 order denying his motion to extend the objection deadline, to postpone the hearing, and to authorize partial distribution, and the July 22, 2003 order denying his motion to reconsider the July 1 order. The district court concluded that these orders were interlocutory in nature and therefore not appealable absent White's standing to appeal the final July 22 allowance order. *See* 28 U.S.C. § 158(a)(1); *White*, 304 B.R. at 270. We agree.

While "the concept of finality . . . has traditionally been applied 'in a more pragmatic and less technical way in bankruptcy cases than in other situations,'" *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986) (quoting *In Re Amatex Corp.*, 755 F.2d 1034, 1039 (3d Cir. 1985)), to be final, an order must "conclusively determine[ ] a separable dispute over a creditor's claim or priority," *In re Saco Local Dev. Corp.*, 711 F.2d 441, 445-46 (1st Cir. 1983); *see also A.H. Robins Co.*, 788 F.2d at 1009 (approvingly citing then-Judge Breyer's characterization of "finality" in *Saco*). White does not even argue that the procedural orders at issue qualified under this test. There was no "separable dispute," nor were any of White's rights "conclusively determined." *See Saco*, 711 F.2d at 445-46.

Similarly, the interlocutory orders do not constitute "collateral orders" that would be immediately appealable. Under the collateral order doctrine, interlocutory orders of the bankruptcy court are appealable if they "conclusively determine [a] disputed question, resolve an important issue completely separate from the merits of [an] action, and [are] effectively unreviewable on appeal from a final judgment." *Grundy Nat'l Bank v. Looney* (*In re Looney*), 823 F.2d 788, 791 (4th Cir. 1987) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)) (internal quotation marks omitted). Again, White does not even contend that these interlocutory orders meet this test, and they surely do not. The interlocutory orders determined nothing conclusively, and were White to have standing to appeal the bankruptcy court's final allowance order, such an appeal would effectively review the interlocutory orders as well.

In this regard, we should add that the bankruptcy court did not deny partial distribution to White; it merely denied expedited hearing of the motion and noted that the motion could be set on any regularly scheduled motions day providing adequate notice.

Thus, we agree with the district court that the interlocutory orders challenged by White would only be appealable as part of an appeal of the July 22 allowance order—the final order of the bankruptcy court into which the interlocutory orders merged. But since we have found that White was not entitled to appeal the July 22 allowance order, so too do we conclude that he was not entitled to appeal the interlocutory orders that merged into it.

Accordingly, we affirm the district court's order dismissing White's appeal of the bankruptcy court's orders dated July 1 and July 22, 2003.

AFFIRMED

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED AND FILED JANUARY 28, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 03-CV-1174

In re:

URBAN BROADCASTING CORP.,

Debtor

THEODORE M. WHITE,

Appellant,

v.

UNIVISION OF VIRGINIA, INC.,

Appellee.

Appeal from Bankruptcy Case
No. 00-13760-SSM

MEMORANDUM OPINION

At issue in this Chapter 7 bankruptcy appeal is whether an appellant has standing to appeal an order of the bankruptcy court authorizing interim distribution of a claim where, as here, the appellant failed to file an objection to the claim as

required by the bankruptcy court's order and then failed to appear and object at the hearing on the trustee's motion for interim distribution of the claim.

I.

Appellant Theodore White was the majority shareholder of Urban Broadcasting Corporation (UBC), an affiliate of the Home Shopping Network, and the owner and operator of a Washington, D.C. UHF television station. On August 1, 2000, UBC filed a bankruptcy petition in this district seeking reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq*. On August 23, 2003, UBC's petition was converted to a Chapter 7 petition. *See* 11 U.S.C. § 1112.

More than a year after UBC filed its Chapter 11 petition, the appellee, Univision of Virginia, Inc. (Univision), a subsidiary of USA Networks, Inc., filed a timely proof of claim against UBC on October 17, 2001 in the amount of $7.9 million.[1] Univision's claim arose from an agreement entered into between UBC and Silver King Broadcasting of Virginia, Inc., Univision's predecessor in interest, on August 21, 1989. Pursuant to that agreement, Silver King had a right

1. Univision's parent company, Univision Communications, Inc., was the successful bidder for the purchase of substantially all of UBC's assets at auction on April 6, 2001. After the auction, White engaged in substantial efforts to delay closing, presumably to upset the sale of UBC to Univision Communications, Inc. The bankruptcy court noted at that time that White's efforts were likely intended "to upset this apple cart." The bankruptcy court further stated that it was suspicious "that most of the concerns raised by [White] are very likely simply a pretext for an effort to derail [the sale] agreement." The sale nonetheless closed in August 2001.

to "put" or sell its shares in UBC to UBC and, in the event certain triggering events occurred, UBC had a corresponding obligation to purchase Silver King's UBC shares for 45% of the fair market value of UBC. The agreement also provided that Silver King's right to exercise the "put" option would be deemed waived in the event that UBC exercised its "call" option under the agreement.[2]

In its October 17 proof of claim, Univision asserted that as Silver King's successor in interest it was entitled to exercise its "put" right under the agreement because the circumstances triggering the "put" right had occurred, namely (1) UBC had defaulted on its long term debt and (2) UBC had ceased its affiliation with HSN or one of HSN's subsidiaries. UBC, however, disputed Univision's right to exercise the "put" option pursuant to the terms of the agreement and filed a timely objection to Univision's proof of claim on December 18, 2001. [The merits of Univision's claim were litigated in the bankruptcy court for the next year and a half in connection with hearings regarding the confirmation of competing Chapter 11 reorganization Plans.] Despite this lengthy period of litigation, the claim was never resolved. The primary disputed issue was whether Univision

2. With regard to UBC's "call" option, the agreement provides that:

> if there is a default in the compensation payments by HSN under any affiliation agreement entered into with the Corporation that remains uncured for thirty (30) days after receipt of written notice by HSN, then the Class A Stockholder or its designee may purchase all of the issued and outstanding shares of Class B Common Stock from Silver King for a purchase price of ten dollars. . . .

was the proper successor in interest to Silver King and thus had rights under the put-call agreement.[3]

In the course of the Chapter 7 proceedings, UBC's assets were sold and its creditors paid. Once all UBC's creditors had been paid from the proceeds of the sale of UBC's assets, the Chapter 7 trustee filed a Motion for Interim Distribution in the bankruptcy court on April 1, 2003 seeking to distribute the debtor's surplus funds to White and Univision as shareholders.[4] The Chapter 7 trustee concluded that White was entitled to 55% of UBC's remaining assets and Univision was entitled to 45%. Yet, Univision opposed the trustee's motion on the ground that it should be paid as a creditor, not a shareholder. Univision, it seems, took this position because distribution as a shareholder might not have a *res judicata* effect with regard to Univision's rights under the put-call agreement and thus Univision was concerned that it would remain subject to possible future litigation by White, whom it considered to be aggressively litigious.

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3. White now raises for the first time a new objection to Univision's rights under the put-call agreement, namely that White had earlier exercised his "call" option under the agreement, resulting in the extinguishment of Univision's "put" right. As counsel for Univision noted at the January 9, 2004 hearing in this appeal, White's objection in this regard was "never asserted, never subjected to discovery, [and] never presented" in the bankruptcy court, despite nearly three years of proceedings. *See* Tr. at 39 (January 9, 2004).

4. The estate initially totaled approximately $31.5 million. The trustee's payment of all creditors left a balance of approximately $17.5 million to be distributed to UBC's sole stockholders, White and Univision.

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Because of Univision's objection to the Chapter 7 trustee's Motion for Interim Distribution, the bankruptcy court held a hearing on June 3, 2000. White did not appear at this hearing. The bankruptcy court, concluding that the trustee's motion required further hearing, entered an order on June 5, 2003 stating that all objections to Univision's claim and the trustee's Motion for Interim Distribution would be heard and resolved at a hearing scheduled for July 22, 2003. Moreover, the June 5 order specifically directed that:

> (i) Univision shall file an amended proof of claim by June 13, 2003 "and shall serve a copy of the amended proof of claim on the trustee and Mr. White."
>
> (ii) The Chapter 7 trustee is substituted for UBC with respect to UBC's objection to Univision's proof of claim, but that "[n]othing in this Order . . . requires the trustee to prosecute the objection. . . ."
>
> (iii) White must file any objection to the allowance of Univision's claim by July 3, 2003 "or be forever barred."
>
> (iv) Univision shall give notice to the trustee and Mr. White of the July 3 claim objection bar date and the July 22 claim allowance hearing.
>
> (v) The Clerk shall mail a copy of the order to the trustee, counsel for Univision, and White.

In compliance with the June 5 order, Univision timely filed its amended proof of claim and properly notified White of

his obligation to object by July 3 on June 13, 2003. White does not dispute that he received proper notice of the June 5 order prior to the July 3 bar date.

On June 30, 2003, White, by counsel, filed three motions: (1) a motion to extend the July 3 deadline for objecting to Univision's claim; (2) a motion to postpone the related July 22 hearing date; and (3) a motion to authorize the trustee to make a partial distribution of the debtor's estate to White, ostensibly to pay legal fees. Without holding a hearing on White's motions and by order dated July 1, 2003, the bankruptcy court denied the motions to extend the July 3 deadline and to postpone the July 22 hearing and declined to consider the motion to authorize the trustee to make a partial distribution on an emergency basis. Specifically, the order stated that:

> So much of the motion to extend deadline, postpone hearing date, and authorize partial distribution is denied as seeks to extend the deadline for filing an objection to the Univision amended proof of claim and to postpone the hearing on the objection to claim. That portion of the motion seeking authority for the trustee to make a partial distribution may be set for hearing on any regularly scheduled motions day that provides at least 15 days notice to the Chapter 7 trustee and Univision.[5]

5. Of interest here is the bankruptcy court's statement in its July 1 order that its denial of White's motions was motivated in part by the fact that "this case has been before the court for an inordinately

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On July 3, 2003, White, now proceeding *pro se*,[6] filed a motion seeking reconsideration of the July 1 order. Yet, White did not at this, or any other time, file an objection to Univision's claim, as the bankruptcy court's June 9 order had directed.

On July 18, 2003, the Chapter 7 trustee provided formal notice to the bankruptcy court and White that he did not intend to prosecute any objection to Univision's claim on the ground "there would be no economic benefit to the bankruptcy estate to be gained by prosecution of this objection," given that White had failed to object to the amended proof of claim and "Univision would be compensated the identical amount whether [paid] as a creditor or as a shareholder."[7] It appears from the trustee's motion

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long period of time and that most of the delay in the administration of the case has been the fault of Mr. White." The court went on to say that it was "unacceptable" for White "to wait until the last moment to attempt to bring new counsel on board and then to cite his own procrastination as the basis for a continuance. . . ."

6. White alleges that he had to proceed *pro se* because he did not have sufficient funds to continue to pay his attorney after the bankruptcy court declined to authorize the trustee to make a partial distribution on an emergency basis.

7. *See* Memorandum Regarding Trustee's Determination Not to Prosecute Debtor's Objection to Univision Proof of Claim, *In re Urban Broadcasting Corp.*, Case No. 00-13760-SSM (Bankr. E.D. Va. July 18, 2003). In this regard, the bankruptcy court noted at the July 22 hearing that precisely because the debtor would pay the same amounts to White and Univision, whether as creditors or shareholders, the trustee had exercised "correct judgment in choosing not to prosecute the claim objection."

that the trustee believed that the issue to be addressed at the July 22 hearing was chiefly whether Univision was to be paid as a shareholder or, alternatively, as a creditor, and not any other objection White might have to Univision's claim.

The July 22 hearing was held as scheduled and White did not appear.[8] As a result of the hearing, the bankruptcy court entered an order allowing Univision's claim and authorizing distribution of $7.9 million to Univision as a creditor of UBC pursuant to its rights under the put-call agreement (July 22 Allowance Order). The remaining UBC assets totaling $8.9 million were distributed to White. Notably, the bankruptcy court in its order reasoned that "the trustee has properly determined not to prosecute the objection to Univision's claim; that no other party has, within the time allowed by the court, filed an objection to the claim; that in the absence of an objection, the claim is deemed allowed. . . ." Although the bankruptcy court heard evidence at the hearing regarding Univision's claim under the put-call agreement, that claim was not disputed. Accordingly, the bankruptcy court allowed the claim and granted the trustee's motion to distribute UBC's assets to Univision in payment of Univision's claim.

On August 1, 2003, White filed here a timely Notice of Appeal *pro se*.[9] Since then White has retained new counsel

8. In its July 22 Allowance Order, the bankruptcy court specifically noted that "Theodore M. White, whom the court directed be given notice of the hearing as the debtor's president and majority shareholder, was not present."

9. A party may "appeal from a final judgment, order, or decree of a bankruptcy judge to a district court" as of right "by filing a (Cont'd)

to represent him in this appeal. On September 25, 2003, Univision filed its motion to dismiss White's appeal on the ground that White lacks standing to prosecute this appeal. Thus, at issue here is whether White lacks standing to appeal and hence whether Univision's motion to dismiss on that basis must be granted.

II.

The starting point in this analysis is the legal standard governing a party's standing to appeal in the bankruptcy context. Prior to 1978, the former Bankruptcy Act, 11 U.S.C. § 67(c), explicitly defined the standard governing standing to appeal. Specifically, § 67(c) provided that any "person aggrieved" had standing to appeal an order of the bankruptcy court and the caselaw interpreting this provision defined "persons aggrieved" as those "whose rights or interests are directly and adversely affected pecuniarily by the order or decree of the bankruptcy court." *McGuirl v. White*, 86 F.3d 1232, 1234 (D.C. Cir. 1996) (citing *In re El San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987)); *In re Elkins Energy Corp.*, 7 B.R. 971, 973 (W.D. Va. 1980) (citing 11 U.S.C. § 67 (now repealed) which permits "a person aggrieved" to appeal an

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notice of appeal with the [bankruptcy court] clerk within the time allowed by Rule 8002." Rule 8001, Fed. R. Bankr. P. Bankruptcy Rule 8002(a) provides that "[t]he notice of appeal shall be filed with the clerk within 10 days from the date of the entry of the judgment, order, or decree appealed from." Rule 8002, Fed. R. Bank. P. 28 U.S.C. § 158 provides that district courts have jurisdiction to review orders of the bankruptcy court and that appeals under this section "shall be taken . . . in the time provided by Rule 8002 of the Bankruptcy Rules." 28 U.S.C. § 158(a) and (c)(2).

order from the bankruptcy court). Yet, in 1978 Congress repealed § 67(c) of the Bankruptcy Act and did not include a provision in the new Act stating a standard for standing to appeal. *See McGuirl*, 86 F.3d at 1234-35. Therefore, as Collier's notes, "[n]o indication is given either in title 11 or title 28 regarding the requisites for standing to appeal an order of the bankruptcy court." 10 *Collier on Bankruptcy* ¶ 8001.05 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2003). Nonetheless, it appears that courts have carried forward to today the pre-1978 "person aggrieved" standard and thus have uniformly held that an individual has standing to appeal if his rights or interests are directly and adversely affected pecuniarily by the order of the bankruptcy court.[10] While this

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10. *See In re Williams*, 49 Fed. Appx. 845, 847 (10th Cir. 2002); *In re Cult Awareness Network, Inc.*, 151 F.3d 605, 607 (7th Cir. 1998) ("Only those persons affected pecuniarily by a bankruptcy order have standing to appeal that order."); *In the matter of Richman*, 104 F.3d at 658 n.2; *McGuirl*, 86 F.3d at 1234 (citing *In re El San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987)) (same); *Willemain v. Kivitz*, 764 F.2d 1019, 1022 (4th Cir. 1985) (same); 9E Am. Jur. 2d *Bankruptcy* § 3522 ("Thus, a person who seeks to appeal an order of a Bankruptcy Court under 28 USCA § 158 must be directly and adversely affected pecuniarily by the order . . ."). Many courts applying this standard still use the language found in the former Bankruptcy Act and thus hold that an individual has standing to appeal if he is a "person aggrieved." *See, e.g., In re Williams*, 49 Fed. Appx. at 847; *In re Clark*, 927 F.2d 793, 796 (4th Cir. 1991).

Typically, a debtor in a Chapter 7 case does not have standing to appeal an order of the bankruptcy court allowing a claim because the debtor's liability to creditors is absolved and thus his pecuniary interests are no longer adversely affected by the bankruptcy court's orders. Nonetheless, a debtor may have standing to appeal where, as

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standard also governs in the Fourth Circuit, decisions in this circuit have applied the term "party in interest" interchangeably with "person aggrieved" to describe the standard, but it is clear that the standard applied is essentially the pre-1978 standard.[11] Thus, the question presented here is whether White meets the standard for standing to appeal.

Before addressing whether White meets the standard for standing to appeal, it is necessary to address a threshold question, namely which bankruptcy court orders are the subject of White's appeal. White argues that he appeals three orders: (1) the July 22 order denying his motion to reconsider; (2) the July 1 order denying his motions to extend the July 3 deadline, delay the hearing, and authorize partial distribution;[12] and (3) the July 22

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here, disallowance of the disputed claim would create a "surplus of assets to be returned to the bankrupt." *Willemain*, 764 F.2d at 1022 (citing *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 706-07 (8th Cir. 1979)); *see also In re Williams*, 49 Fed. Appx. at 847; *McGuirl*, 86 F.3d at 1234; *In re Weston*, 18 F.3d 860, 863-64 (10th Cir. 1994).

The only exception to the standard for standing to appeal is for the United States Trustee who may appeal an order of the bankruptcy court on behalf of the "public interest," even though his pecuniary interests are not affected. *See In re Clark*, 927 F.2d at 796; 1 *Collier on Bankruptcy* ¶ 5.06.

11. *See In the matter of Richman*, 104 F.3d at 658 n.2 (party in interest); *In re Clark*, *In re Clark*, 927 F.2d 793, 796 (4th Cir. 1991) (party aggrieved); *Willemain*, 764 F.2d at 1022 (party in interest); *see also McGuirl*, 86 F.3d at 1234-35 (analogizing the terminology).

12. White's appeal from the July 1 order is not subject to the ten-day period to appeal because a timely motion to reconsider tolls

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Allowance Order. The first two orders are interlocutory[13] and thus not appealable absent (i) leave of the bankruptcy court,[14]

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the ten-day period until the court enters an order on the motion to reconsider. *See In the matter of Richman*, 104 F.3d at 659 n.5 (stating that a motion to reconsider stayed the ten-day period to appeal until an order was entered on the motion to reconsider).

13. Controlling authority defines a final order as an order that "resolve[s] the litigation, decide[s] the merits, settle[s] liability, establish[es] damages, or even determine[s] the rights of any party to [the] bankruptcy case." *Culver v. Molinario*, 1995 U.S. App. LEXIS 27579, at *2 (4th Cir. September 28, 1995) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)); *In re Looney*, 823 F.2d 788, 790 (4th Cir. 1987). To the contrary, an interlocutory order is "one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken to enable the court to adjudicate the cause on the merits." *Culver*, 1995 U.S. App. LEXIS 27579, at *2-3. Courts interpret finality liberally in bankruptcy appeals because bankruptcy cases typically involve numerous parties in interest and an aggregation of individual controversies. *See* 1 *Collier on Bankruptcy* ¶ 5.07[1][b]; *Culver*, 1995 U.S. App. LEXIS 27579, at *3; *In re Looney*, 823 F.2d at 790. Notwithstanding this liberal interpretation of the final judgment rule in bankruptcy cases, the bankruptcy court's orders denying White's motions to extend the deadline to file an objection, to postpone the hearing date, and to authorize the trustee to make a partial distribution are undoubtedly interlocutory.

14. *See* 28 U.S.C. § 158(a) ("The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees; (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and (3) with leave of court, from other interlocutory orders and decrees. . . .").

which did not occur here, or (ii) entry of a final, appealable judgment such that the "interlocutory orders merge into that judgment."[15] Thus, the proper focus here is whether White has standing to appeal the July 22 Allowance Order. If so, then the two interlocutory orders, which merge into the final order, are properly considered on appeal. But if White lacks standing to appeal the July 22 Allowance Order, then the interlocutory orders are not appealable[16] and it would then be unnecessary to reach and decide Univision's further contention that White lost his right to appeal the interlocutory

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15. *In re Dunes Hotel Assoc.*, 1998 U.S. App. LEXIS 16747, at *9 (4th Cir. July 22, 1998) ("We note further that the dismissal of the bankruptcy petition is a final judgment, and all interlocutory orders merge into that judgment; that is, Dunes in appealing the dismissal may appeal any interlocutory orders that underlie it as well."); *Bankers Trust Co. v. Lee Keeling & Assoc., Inc.*, 20 F.3d 1092, 1096 (10th Cir. 1994) (citing *Mock v. T.G. & Y. Stores*, 971 F.2d 522, 527 (10th Cir. 1992)) *(same)*.

16. *See In re Magnolia Gas Co., L.L.C.*, 33 Fed. Appx. 418, 422 (10th Cir. 2002) ("[I]f the final judgment itself is unappealable, the interlocutory ruling is rendered unappealable as well."); *Mock*, 971 F.2d at 527 (holding that interlocutory orders merged into a final judgment that was unappealable, also could not be appealed); *In re Spillane*, 884 F.2d 642, 648 (1st Cir. 1989) ("[E]ntry of a final, *appealable* order will enable an appellant to request review of earlier nonfinal decisions upon which the final decision rests.") (emphasis added); *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976) ("An interlocutory appeal is permissive, not mandatory. When an appeal is not taken, the interlocutory order merges in the final judgment and may be challenged *in an appeal from that judgment*.") (emphasis added).

extension orders as a consequence of failing to designate these orders in his Notice of Appeal.[17]

The conclusion that White lacks standing to appeal the July 22 Allowance Order is compelled on two distinct, but related, grounds. First, White was clearly and unambiguously ordered by the bankruptcy court in its June 5 order to file an objection to Univision's claim by July 3 or be "forever barred." White failed to comply; he filed no objection by July 3 or ever. Therefore, his objection to Univision's claim is forever barred. Because White failed to object, the bankruptcy court, when it allowed Univision's claim, was not aware of any objection by White to the claim or of any evidence White might offer in support of an objection. Given this and given the clarity of the bankruptcy court's June 5 order, White's objection has been "forever barred,"[18] and thus

17. While White did not specifically indicate in his Notice of Appeal that he was appealing the interlocutory extension orders, the Fourth Circuit made clear in *Canady v. Crestar Mortg. Corp.*, 109 F.3d 969, 974 (4th Cir. 1997), that a party will not lose his right to appeal as a result of "an error in designating the issue appealed . . . as long as 'the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake.'" *See id.* (citing *Lynn v. Sheet Metal Workers' Int'l, Ass'n*, 804 F.2d 1472, 1481 (9th Cir. 1986)). In determining whether "intent" and "prejudice" exist, Canady provides that a court should assess whether the appellee had notice of the issues on appeal and an opportunity to brief the issues. *See id.* Specifically, the *Canady* court noted that an appellee does not waive his right to appeal even if he failed to indicate his appeal in the Notice of Appeal, if he addresses the issue in his opening brief. *See id.*

18. *See In re Urban Broadcasting Corp.*, Case No. 00-13760 (Bankr. E.D. Va. June 5, 2003) (Order) (expressly requiring White to file his objection to Univision's claim by July 3 "or be forever barred").

he is not a "person aggrieved" or "party in interest" with regard to the July 22 Allowance Order and does not meet the standard governing standing to appeal. A contrary conclusion would render bankruptcy court orders meaningless and imperil the integrity of the bankruptcy process.[19]

White attempts to avoid this conclusion by arguing that his failure to object by the July 3 bar date must be excused (i) because he did not receive notice that the Chapter 7 trustee would not prosecute UBC's objection at the July 22 hearing until July 18, four days before the hearing, and (ii) because he filed a motion to reconsider the bankruptcy court's denial of his motion to extend the deadline to object on July 3. White's failure to comply with the June 5 order is not excused on either ground. Although White was not formally notified of the trustee's intention not to prosecute the objection until July 18, the bankruptcy court's June 9 order makes clear that the trustee is not obligated to prosecute the objection. Moreover, White's failure to object is not excused by his motion to reconsider. To conclude otherwise would permit any party to ignore a bankruptcy court's order setting a deadline simply by filing a motion to reconsider.

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19. Settled precedent makes clear that orders of a bankruptcy court are binding and that failure to comply with them may result in dismissal. *See Acstar Ins. Co. v. Harden*, 16 Fed. Appx. 213, 216 (4th Cir. 2001) (finding an order of the bankruptcy court binding); *Spartan Mills v. Bank of America Illinois*, 112 F.3d 1251, 1255 (4th Cir. 1997) (same); *see also Reisner v. Stoller*, 51 F. Supp. 2d 430, 446 (S.D.N.Y. 1999) (dismissing a petitioner's bankruptcy petition on the grounds that the petitioner failed to comply with a pre-confirmation order of the bankruptcy court).

White's failure to attend and object at the properly-noticed July 22 hearing is a second ground for the conclusion that White lacks standing to appeal the order that resulted from the hearing. While this circuit has not resolved the question whether attendance and objection at the hearing are pre-requisites for standing to appeal the order, three other circuits—the Seventh, Ninth, and Tenth—have squarely addressed the issue and concluded that attendance and objection at the bankruptcy court proceedings are pre-requisites for standing to appeal an order from that proceeding.[20] Especially instructive is the Tenth Circuit's decision in *In re Weston*, 18 F.3d 860 (10th Cir. 1994), which held that a group of creditors did not have standing to appeal the bankruptcy court's order electing a Chapter 7 trustee because the creditors "did not file an objection or response to the motion to resolve the disputed election" and "did not appear at the hearing set to resolve the debtor's objections." *In re Weston*, 18 F.3d at 864. The Seventh Circuit reached the same result in *In the matter of Schultz Manufacturing Fabricating Co.*, 956 F.2d 686 (7th Cir. 1991). There, the

20. *See In the matter of Schultz Mfg. Fabricating Co.*, 956 F.2d 686, 690 (7th Cir. 1991) ("Prerequisites for being a 'person aggrieved' are attendance and objection at a bankruptcy court proceeding."); *In re Weston*, 18 F.3d at 864 (holding that creditors lacked standing to appeal for failing to object and appear at the bankruptcy court's proceedings); *In re Commercial Western Finance Corp.*, 761 F.2d 1329, 1335 (9th Cir. 1985) (holding that a group of investors did not have standing to appeal the bankruptcy court's order because they did not appear or object at the hearing); *but see In re Ernst, Inc.*, 2 B.R. 757, 761 (S.D.N.Y. 1980) (finding that appearance at the bankruptcy court proceedings is not a prerequisite to standing to appeal based on an interpretation of the former and now-repealed 11 U.S.C. § 67).

court held that a creditor and shareholder of the debtor did not have standing to appeal two orders of the bankruptcy court regarding settlement of a mechanic's lien claim because the creditor and shareholder failed to appear and object at the bankruptcy court hearing. *See In the matter of Schultz Mfg. Fabricating Co.*, 956 F.2d at 690-91. Similarly, the Ninth Circuit, in *In re Commercial Western Finance Corp.*, 761 F.2d 1329 (9th Cir. 1985), noted that a group of investors would have lacked standing to appeal an order of the bankruptcy court confirming a Chapter 11 reorganization plan because they failed to attend and object at the bankruptcy court hearing had they received proper notice of the consequences of the bankruptcy court's order. *See In re Commercial Western Finance Corp.*, 761 F.2d at 1335.

These three decisions plainly stand for the proposition that attendance and objection at a bankruptcy court hearing are pre-requisites for standing to appeal the order that results from that hearing, provided the party seeking to appeal received proper notice of the hearing.[21] It is fair to note, however, that these decisions include no extensive discussion of the rationale for holding that attendance and objection are pre-requisites to appellate standing. Only the Seventh Circuit's decision in *In the matter of Schultz Manufacturing Fabricating Co.*, 956 F.2d 686, explicitly provides a rationale

21. *See In the matter of Schultz Mfg. Fabricating Co.*, 956 F.2d at 690 (stating that due process requires that an objecting party who "did not receive notice of the proceedings below and of his opportunity to object" may appeal the bankruptcy court's order); *In re Commercial Western Finance Corp.*, 761 F.2d at 1335 (finding that the appellant had standing to appeal even though he did not attend or object at the bankruptcy court hearing because he did not receive proper notice of the hearing).

for these pre-requisites. According to the unanimous Seventh Circuit panel, the attendance and objection standing requirements are intended to ensure "judicial efficiency and certainty." *See In re Schultz Mfg. Fabricating Co.*, 956 F.2d at 690. This sound and important rationale received more complete expression in a sixty-year-old district court opinion, *In re Mifflinburg Body Co.*, 54 F. Supp. 560 (M.D. Pa. 1944), in which that court stated:

> [I]t is [the party to litigation's] duty to appear at the hearing and present to the court evidence and legal authorities which will be of aid to the court in making its decision. If he does not do so, the court must make its decision without the benefit of any evidence which such person might have made available. . . . [This] would cause unlimited confusion and even disrespect of the courts and their authority.

See id. at 561. Thus, it seems likely that when ultimately presented to the Fourth Circuit (perhaps in this case) that it too, consistent with the Seventh, Ninth, and Tenth Circuits, will conclude that attendance and objection at the bankruptcy court hearing are pre-requisites to appellate standing. These standing pre-requisites ensure that the bankruptcy court is made aware of all available evidence and objections when making its determination whether to allow a claim and prevent a party in interest from "lying in the weeds" during bankruptcy court proceedings regarding a claim, only to appeal and generate additional unnecessary proceedings upon remand.

White attempts to avoid the conclusion that he lacks standing to appeal by arguing that his failure to object to the claim and appear at the hearing should be assessed as a waiver, rather than a standing, issue. And, in this respect, White contends that his failure to object and appear does not constitute waiver because it was not a "voluntar[y] or intentional [ ] relinquish[ment] of a known claim right," as controlling caselaw requires.[22] Yet, it is unnecessary to determine whether White waived his right to object to July 22 Allowance Order because White lacks standing to appeal on the grounds discussed above. Even assuming *arguendo* that White had standing to appeal, however, White's failure to object despite specific direction by the bankruptcy court to do so is a "voluntary and intentional" relinquishment of his objection and hence a waiver. As a consequence, White is barred from attacking Univision's claim and the Allowance Order. *See In re Varat Enterprises, Inc.*, 81 F.3d at 1317 (holding that waiver estops the party in interest from subsequently contesting the claim); *In re AMF Bowling Worldwide, Inc.*, 278 B.R. at 101 (same).

In sum, White lacks standing to appeal the order of the bankruptcy court allowing Univision's claim (i) because he

22. *In re Varat Enterprises, Inc.*, 81 F.3d 1310, 1317 (4th Cir. 1996) (finding that a party in interest had waived his right to object to a creditor's claim); *see also In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149, 159 (4th Cir. 1999) ("For DeBartolo to have voluntarily waived its right to an administrative claim, there must be some clear, affirmative language relinquishing that right in the Overbid Order."); *In re AMF Bowling Worldwide, Inc.*, 278 B.R. 96, 101 (E.D. Va. 2002) (holding that a party in interest had waived its right to object to the priming of its liens because it had failed to object to the debtor-in-possession order and had failed to appeal that order).

failed to file an objection to the claim despite the bankruptcy court's order to do so by July 3 "or be forever barred" and (ii) because he failed to appear and object at the July 22 bankruptcy court hearing regarding Univision's claim. Accordingly, Univision's motion to dismiss White's appeal on the grounds that White lacked standing must be granted and White's appeal must be dismissed.

An appropriate order will issue.

Alexandria, Virginia
January 28, 2004

s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 8, 2005

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 8, 2005

No. 04-1262
BK-00-13760-SSM
CA-03-1174

In re: URBAN BROADCASTING CORPORATION

Debtor

THEODORE M. WHITE

Appellant

v.

UNIVISION OF VIRGINIA INCORPORATED;

Appellee

STANLEY M. SALUS

Trustee - Appellee

and

U.S. TRUSTEE

Party-in-interest

Appendix C

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered for a panel composed of Judge Niemeyer, Judge Michael, and Judge Duncan.

For the Court,

/s/ Patricia S. Connor
CLERK